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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

Bobby W. Kennedy, Pro Se

Petitioner,

vs.

**Daniel S. Goldin, Administrator,
National Aeronautics and Space Administration,**

Respondant

Petition for Writ of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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87 pp

QUESTIONS PRESENTED

1) Why is a different scale of justice allowed between the circuits when the 11th Circuit interprets the four prong test prima facie age discrimination once the nonmovant meets prima facie the 11th Circuit allows the movant to prevail using nondiscriminatative tactics to overcome the clear discrimination that has been proven ?

2) Whether the Circuit Court erred in affirming the District Court granting summary judgment when the District Court ruled that the petitioner met a prima facie case in eight promotions when petitioner claimed age discrimination and the court allowed the defense to give nondiscriminatory reasons for denying the promotions to the petitioner while the case clearly shows retaliation for filing discrimination complaints of age , handicap, race, retaliation , sex, whistle- blowing hazards to workers and public's safety suspension from work, breach of contract, while the decision maker's motive was to force the petitioner out of government service ?

3) Whether the Circuit Court fundamentally altered the requirement for proof of motive in holding that petitioner failed to make out a prima facie case in some of the age, handicap, race, retaliation, sex, whistleblowing hazards to workers and public's safety, suspension from work, breach of contract, and after the petitioner met a prima facie case in eight promotions the appeals court allowed the respondent to discriminate clearly by planned and pretextual

QUESTIONS--Continued

intentional discrimination while the decision maker's motive would have the petitioner forced out of government service ?

4) Whether the Appeals Court erred in affirming the granting of summary judgment on petitioner's claim involving breach of contract concerning the prior EEO settlement agreement and the appeal Court rejected that contention and affirmed the grant of summary judgment, but not for the reasons stated by the district court, instead, ruling that summary judgment is proper because the agreement term that petitioner alleges NASA breached is not contained in the written settlement agreement, and for the additional reason that the agreement contains a provision specifying an exclusive procedure for remedying a breach by NASA, and petitioner's lawsuit is outside the terms of that remedy provision overlooking that the petitioner filed a proper complaint on the breach of contract with the agency as required and appeal to Equal Employment Opportunity Commission ?

PARTIES TO THE PROCEEDING

Bobby W. Kennedy was the Plaintiff in the lower court proceedings and the appellant before the United States Court of Appeals for the Eleventh Circuit.

Daniel S. Goldin. By regulation he has been named as the respondent and the Defendant in the case before the lower court proceedings of this case and was the appellee before the United States Court of Appeals for the Eleventh Circuit.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons For Granting the Writ 10

Conclusion 25

APPENDIX

Page

Appendix A -- Opinion of the United States Court of Appeals for the Eleventh Circuit Filed May 20, 1996 . . . . . 1a

Appendix B --Judgment of the United States Court of Appeals for the Eleventh Circuit Filed July 31, 1996 . . . . . 3a

Appendix C --Judgment of the United States Court for the Northern District of Alabama Middle Division, Dated August 10, 1995 . . . . . 5a

APPENDIX--Continued

Page

Appendix D -Judgment of the United States Court for the Northern District of Alabama, Dated August 10, 1995 ..... 51a

TABLE OF CITATIONS

Page

Cases

Barnes v. Southwest Forest, Inc., 814 F. 2d 607, 609 (11th Cir. 1987) 18

Bush v. Lucas, 462 U.S. 367 (1983) 11

Carter v. City of Miami, 870 F.2d 578, 582-83 (11th Cir. 1989) . . . . . 14 ,9

Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 (10th Cir. 1988) 13

Cormier v. P.P.G. Industries, Inc. 519 F. Supp 211 (W.D. La 1981), afft 702 F.2d 567 (5th Cir. 1983) 12

D.C. Cuddy v. Carmen, 694 F.2d 853, 857 (D.C. Cir. 1982) 14

Detroit Police Officer Ass'n v. Young, 608 F.2d 671 (6th Cir 1979) cert. denied 452 U.S. 938 (1981) 12

Douglas v. Anderson, 656 F.2d 528, 532 (9th Cir. 1981) 13

Eatmon v. Bristol & Iron Works, Inc.

TABLE OF CITATIONS- Continued

Page

729 F. 2d 1503 (11th Cir. 1985) 23

Freeman v. Packaging Machine Co., 865 F.2d 1331, 1335 n.1 (1st Cir. 1988) 13

Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207 (5th Cir. 1981) 24

Haskell v. Kemen Corp. 743 F.2d 113, 119 n.1 (2nd Cir 1984). 13

LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 379 (6th Cir 1993) 14

Maxfield v. Sinclair Int'l. 766 F.2d 788, 792 (3rd Cir), cert. denied 474 U.S. 1057 (1986) 15

Maxfield v. Sinclair International v. Prive Corp, 987 F.2d 324, 326-327 (5th Cir. 1993) 13

McDonnell Douglas Corporation, v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) 9

Milton v. Weinberger. 696 F.2d 94 (D.C. Cir 1982 12

TABLE OF CITATIONS-Continued

Page

Miranda Supra citing American Foreign Ins. v. Colonial Mfg. Co.,936 F.2d 1161, 1164 (11th Cir 1991) 18

Miranda Supra citing Lowe v. Aldridge, 958 F.2d 1565 (11th Cir 1992) 18

O'Conner v. Consolidated Coin Caterers Corp., No. 95-354 11

Raush v. KFC Nat'l Mgt. Co., 10 F.3d 392, 396 (6th Cir 1993) 14

Rinehard v. City of Independence, 35 F.3d 1263, 1265-66 (8th Cir. 1994) 13

Rollings v. TechSouth Inc., 833 F.2d 1525, 1528 (11th Cir 1987) 18

Roper v. Peabody, 47 F.3d 925, 927 (7th Cir. 1995) 13

Whittaker v. Morgan State University, 42 Fair Empl. Prac.Cas (BNA) 878 (D. Md. Dec. 8, 1986) 23

Young v. General Food Corp., 840 F.2d 825, 828 (11th Cir 1988) cert. denied, 488 U.S. 1004 (1989) 10

Statutes

Page

28 U.S.C. Section 1346 . . . . . 3 ,5

29 U.S.C. S 601 2

29 U.S.C. 794 2

29 U.S.C. 621 . . . . . .2 ,6

29 U.S.C. 633 . . . . . .2 ,6

29 U.S.C. 791 . . . . . .2 ,6

42 U.S.C. Section 2000 . . . . . .2 ,6

42 U.S.C. Section 2000 (e) (2) . . . . . .2 ,7

42 U.S.C. Section 2000 (e) (3) . . . . . .2 ,7

42 U.S.C. Section 2000 l6(c) . . . . . .2 ,7

5 U.S.C. 2302(b)(8) 3,,7

Breach of Contract Claim 21,25

1113 Cong. Rec. 31,255 (1967) 15

Constitutional Torts 3

Fourth, Fifth, and Fourteenth Amendment . . 3

Handicap 501,503,504 Rehabilitation Act 1973 . 3

No.

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BOBBY W. KENNEDY

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vs.

DANIEL S. GOLDIN, ADMINISTRATOR FOR THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On May 20, 1996 the United States Court of Appeals for the Eleventh Circuit issued its opinion, affirming the decision of the District Court. That opinion (3a) was nonpublished.

JURISDICTION

The Circuit Court rendered its opinion in this case on May 20, 1996. This opinion was not published. Petitioner moved for a petition for rehearing and a petition En Banc and a motion to exceed the page limit on the petition for rehearing and a petition En banc denied and the motion to file the petition for rehearing and a petition En Banc out of time is denied as moot, July 30, 1996. This is the judgment sought to be reviewed. The mandate issued July 31, 1996. This court has jurisdiction to review the judgment of the United States Court of appeals for the Eleventh Circuit by Writ of Certiorari pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. S 601, et seq. ("ADEA"),also U.S.C. 621 and 633 (a) et seq.; The Rehabilitation Act of 1973, 29 U.S.C. S 794; Handicap discrimination 29 U.S.C. Section 791, Race and Sex Discrimination 42 U.S.C. S 2000, EEO Reprisal and retaliation under Title VII, Civil Rights Act of 1991, 703 to Title VII, 42 U.S.C. 2000 (e)(3), and 2000 (e) 16 (c) and 2000 (e)(2) Retaliation Employment Discrimination; Title VII, 42 U.S.C. S 2000 (e)(2); Sex and Race Discrim-

ination and The Whistleblower Protection Act, 5 U.S.C. 2302 (b)(8).Handicap 501, 503, & 504 Rehabiliation Act 1973 ; Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States. 28 U.S.C. Section 1346 et.seq., under Title VII, Civil rights Act of 1991,Constitutional Torts Breach of Contract Claim

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Northern District of Alabama, Middle Division, on January 4, 1994, seeking remedies under The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. S 601, et. seq. ("ADEA"), also U.S.C. 621 and 633 (a) et seq.;The Rehabilitation Act of 1973, 29 U.S.C. S 794; Handicap Discrimination 29 U.S.C. Section 791, Race and Sex Discrimination 42 U.S.C. S 2000, EEO Reprisal and retaliation under title VII, Civil Rights Act of 1991, 703 toTitle VII, 42 U.S.C. 2000(e)(3), and 2000 (e) 16 (c) and 2000 (e)(2) Retaliation Employment Discrimination; Title VII, 42 U.S.C. S 2000(e)(2); Sex and Race Discrimination and The Whistleblower Protection Act, 5 U.S.C. 2302(b)(8), Handicap 501, 503, 504, Rehabiliation Act 1973 ; Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, 28 U.S.C. Section 1346 et. seq. under Title VII, Civil Rights Act of 1991.Breach of Contract Claim.

Statement of the Facts

This case involves allegations of breach of contract, age, race, and handicap discrimination and retaliation against the petitioner for filing of discrimination claims and for Whistle Blowing with respect to Petitioner revealing various illegal wrongful conduct. The Petitioner contends that he has been denied promotions by his employer on account of his age and handicap (diabetes) as a part of a continuous retaliation against the plaintiff for his filing of discrimination claims, etc., in the past.

Undisputed Fact

1. The Petitioner has been employed by the National Aeronautics and Space Administration ("NASA") since October of 1960.

2. The Petitioner is a white male, born on September 27, 1936, now 59 years of age.

3. At the time this action was filed the Petitioner at NASA was an AST Electronics and Materials Supervisor, and was a deputy branch chief, but has since been removed from supervision as further retaliation discrimination.

Petitioner's position

Petitioner, Bobby W. Kennedy claims the Respondents have breached an oral agreement/ contractual agreement that if Petitioner settled ten EEO complaints of discrimination/retaliation, etc. based on age, handicap, etc., discrimination that Petitioner would get within two months of his signing the agreement to settle those EEO claims a GM-14 supervisory job which would be retroactive to 1988, also, so that he would get the difference in pay

between the GS-14 and the GM-14 job, and Petitioner believes the representations of the Respondents did sign the settlement agreement and did receive the GS-14 job retroactive to 1988 as was agreed, but within the two month period after signing the settlement agreement, Petitioner did not receive the GM-14 supervisory job retroactive to 1988 and it was only after the Petitioner filed many more EEO Discrimination Claims that the Respondents gave Petitioner his GM-14 supervisory job, but did not make it retroactive to 1988, as was agreed and represented to the Petitioner by the Respondents as was done on the GS-14 job. Petitioner received the GM-14 supervisory job about a year after the settlement agreement was signed by the Petitioner. Consequently, Respondents are guilty of breach of contract. Petitioner, as a result of the breach of the oral agreement, as aforesaid, was also, caused to lose the advantage of being allowed to have said supervisory job which would have been very important to the Petitioner in acquiring higher level supervisory jobs, including, but not limited to, some of the supervisory jobs, that have also been made the basis of this cause of action. 28 U.S.C. Section 1346, et. seq.

Petitioner also claims that Respondents engaged in unlawful discriminatory employment practices against Petitioner with respect to Petitioner's failing to get job/promotions pursuant to his application for various jobs, and it is the Petitioner's position that he didn't get the jobs he applied for as a result of age, handicap, sex, and race discrimination and as part of a continuous retaliation against the Petitioner for

having made the previous EEO complaints, notwithstanding that Respondents settled the first ten EEO complaints that the Petitioner filed, and it is the Petitioner's position that all of these individuals that were selected for those jobs were less qualified than Petitioner. That the Respondents have engaged in continuous retaliatory actions against the Petitioner with regards to the terms and conditions of his employment with the Respondents on account of his age, handicap, sex, and race and on account of his having made such discriminatory complaints as well as having "WhistleBlown" about various illegal practices engaged in by the Respondents in violation of th aforementioned law set forth in paragraph 2, supra. That as part of the wrongful retaliation of Respondents the Petitioner's life has been threatened and the Respondents have taken other various wrongful action as against Petitioner. That Petitioner contends that the aforementioned wrongful breach of contract, discriminatory/retaliaition/disparate wrongful action has proximately cause the petitioner to suffer various injuries, damages and losses, including, but not limited to, lost wages benefits, constructive loss of seniority, mental anguish, wherein Petitioner seeks all legal and equitable relief to which the law allows.

Petitioner has brought action also, on the basis of age discrimination, 29 U.S.C. Section 621 and 633 (a), et. seq.; handicap discrimination, 29 U.S.C. Section 791, et. seq.; race and sex discrimination, 42 U.S.C. Section 2000, et. seq.; and, for wrongful EEO reprisal and retaliation action pursuant to and under Title VII, Civil Rights Act of 1991, 703 of Title VII,

42 U.S.C. Section 2000 (e) (2), and 2000 (e) (3), and 2000 (e) (16) (C), et. seq.; and under the Whistle Blowing Act pursuant to 5 U.S.C. Section 2302, et. seq.. The total number of discrimination claims based on age, handicap, race, sex or reprisal/retaliation, that have been made the basis of the Petitioner's causes of action herein, are approximately 23 separate claims and for convenience NASA's EEO office consolidated many of the complaints and assigned various numbers to them. The first ten, age and physical handicap discrimination and retaliation claims filed by Petitioner were settledl pursuant to oral agreement and written agreement dated October 4, 1990, which have also been made the basis of the breach of the oral agreement and it is Petitioner's contention that the Respondent admitted committing the wrongful discrimination conduct/wrongful retaliation/wrongful EEO reprisal conduct and that is why the Respondents by and through authorized agents, not only admitted the wrongful discriminatory conduct but further, promised the Petitioner that there would be no future wrongful discrimination/retaliation/EEO reprisals and that the four main supervisory wrong doers would be removed from those positions and all of them wee, in fact, removed except for one supervisory employee, Martin, who has just been promoted to chief of the Electrical Design Division and is over Petitioner, Bobby Kennedy, in his supervisory capacity, at this time. The first ten discrimination complaints filed by Petitioner that were settled pursuant to the oral and written agreement of October 4, 1990, were based on age discrimination and one or two of the last

discrimination claims also included physica handicap discriminatory complaints. The next thirteen complaints of the Petitioner for discrimination/retaliation/EEO reprisals are listed and it is Petitioner's contention that all of said wrongful action involved a continuing discriminatory/retaliation and EEO reprisal/retaliation of the Respondents, to-wit : the discrimination claims of the Petitioner are as follows, to-wit :

> NCN-91-MSFC-BO24, NCN-91-MSFC-BO24, NCN-92-MSFC-B005, NCN-92-MSFC-B013 (involves EEO complaints based on age and physical handicap discrimination); NCN-92-MSFC-BO5O (which involves removal of handicap information by the Respondents as well as age and handicap discrimination); NCN-92-MSFC-B055, NCN-93-MSFC-B010, NCN-93-MSFC-B012, NCN-93-MSFC-B024 (which involves age and physical handicap discrimination and also a specific reference to Respondents wrongful continuing retaliation); NCN-93-MSFC-B028, NCN-93-MSFC-BO29, NCN-93-MSFC-B054 (which includes, along with age and handicap, discrimination claims of sex discrimination and continuing wrongful retaliation complaints), NCN-93-MSFC-B072 (which, in addition, to age and handicap discrimination complaints, also makes specific reference to a continuing wrongful retaliation and supervisor's threats).

It is Petitioner's contention that he can prove the wrongful discrimination and EEO reprisalretaliation

by direct evidence of discriminatory intent via, the Respondent's authorized agent's admission of committing said wrongful acts and also, by meeting the four-prong test set out for Title VII cases in *Mc-Donnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973) and also, through statistical proof, *Carter v. City of Miami,* 870 F. 2d 578 (11th Cir. 1989).

Petitioner seeks all relief, both legal and equitable, provided by Law, with respect to the wrongful conduct which has been made the basis of the Petitioner's cause of action for the aforementioned wrongful discrimination/retaliation/EEO reprisal actions of the Respondents.

Plaintiff also submits that as part of the continuing EEO retaliation/reprisal, the Respondents have wrongfully acted as against him by the aforementioned wrongful acts and also by committing other wrongful acts, such as, but not limited to, threatening Petitioner's job security, threatening Petitioner's life and safety, suspended Petitioner for twenty-one days for an alleged/trumped up misconduct charge. Plaintiff seeks all legal and equirable releif afforded by Law, with respect to said wrongful conduct, including, but not limited to, lost wages for the twenty-one day suspension period.

ARGUMENT

1. Why is a different scale of justice allowed between the circuits where the 11th Circuit interprets the four prong test prima facie age discrimination once the nonmovant meets prima facie the 11th circuit allows the movant to prevail using nondiscriminatative tactics to overcome the clear discrimination that has been proven ?

Once prima facie requirement has been met and the older person is qualified for the job, the movant should not be allowed to circumvent the discrimination by pretending that the younger person is more qualified, when in fact is not, in order to avoid discrimination .

The defendant admitted that the plaintiff established a prima facie case and the plaintiff clearly established intentional discrimination; however, the 11th Circuit has a history of granting summary judgment in favor of the employer, *Young v. General Food Corp.*, 840 F.2d 825, 828 (11th Cir. 1988) cert. denied, 488 U.S. 1004 (1989). Ruling that the plaintiff must significantly show probative "evidence of pretext" in order to avoid summary judgment. Id. at 829. In applying the above principles to the instant facts, it is evident that the plaintiff met his burden of showing sufficient evidence of pretext to survive the summary judgment.

The plaintiff had direct evidence that the Director of EEO Office at MSFC admitted that he had been

and was continuing to be discriminated against after plaintiff had filed several more discrimination complaints that are part of this cause of action and the ten previous discrimination complaints that were settled in settlement agreement. The court has found that the comprehensive procedural and substantive provisions protecting federal civil servants against arbitrary action by supervisors and providing meaningful remedies for employees unfairly disciplined in a special factor counseling hesitation before authorizing a new kind of federal litigation. *Bush v. Lucas,* 462 U.S. 367 (1983). This case demonstrates that Marshall Space flight Center, NASA, has a long pattern and history of discriminating against its employees .

The recent Supreme Court ruling in *O'Connor v.Consolidated Coin Caterers Corp.* No. 95-354 ruled in favor when a prima facie claim of age discrimination precluded by the fact that the employee who secures the job that the claimant was denied is with the class of persons protected against age discrimination. Clear direction from the Court that parallels the recent decision in the *O'Conner v. Consolidated Coin Caterers, Corp.* which established a rule that if they were both in a protective category but sufficient difference in age discrimination is allowed.

Under the United States Constitution the employer must satisfy the Equal Protection Clause of the Fourteenth Amendment which the Respondent failed to do. Once discrimination has been proved

the Respondent then bears a heavy burden of showing that relief should not be issue *Milton v. Weinberger,* 696 F.2d 94 D.C. Cir 1982.

A wide range of variances in the manner in which the different circuits allow the Respondent to defend discriminatory intent substantiates that they would have taken the same action absent discrimination. The court should lay down a unified rule to all of the circuits that once a discriminating pattern has occurred the Respondent could not seek relief in attempting to state that absent discrimination the Respondent would have made the same decision.

Discriminatory intent may be established by any evidence which logically supports an inference of invidious purpose. *Detroit Police Officer Ass'n v. Young,* 608 F.2d 671 (6th Cir 1979) Cert. denied 452 U.S. 938 (1981).

This evidence of discriminatory acts occuring years prior to the pertinent period may be considered on the issue of whether a pattern of discrimination acts occurring years prior to the pertinent period may be considered on the issue of whether a pattern of discrimination existed, leading up to the period in question. *Cormier v. P.P.G. Industries, Inc.* 519 F. Supp. 211 (W.D. La 1981), Affd 702 F. 2d 567 (5th Cir 1983)

2. Whether the Circuit Court erred in affirming the District Court granting summary judgment when the District Court ruled that petitioner met a prima

facie case in eight promotions and not in fifteen, when petitioner claimed age discrimination and the court allowed the defense to give nondiscriminatory reasons for denying the promotions to the petitioner while the case clearly shows retaliation for filing discrimination complaints of age, handicap, race, retaliation, sex, whistleblowing hazards to workers and public's safety, suspension from work, breach of contract, while the decision maker's motive was to force the petitioner out of government service ?

Ten Circuit Courts have held that thereplacement or promotions need not be within the protected age group, and in one other Circuit there are cases both ways. The Circuit Court below lightly recognized, that there was contrary authority to their ruling , but failed to indicate the truly overwhelming weight of the contrary authority.

The requirement of an under-age-40 replacement offends the history and policy of ADEA.

Freeman v. Packaging Machine Co., 865 F.2d 1331, 1335 n.1 (1st Cir. 1988) (age of replacement not a factor); *Haskell v. Kemen Corp.,* 743 F.2d 113, 119 n.1 (2nd Cir. 1984); *Maxfield v. Sinclair Intenational,* 766 F.2d 788, 792-93 (3rd Cir. 1985); *Lindsay v. Prive Corp.,* 987 F.2d 324, 326-327 (5th Cir. 1993); *Roper v. Peabody,* 47 F.3d 925, 927 (7th Cir. 1995); *Rinehard v. City of Independence,* 35 F.3d 1263, 1265-66 (8th Cir.1994); *Douglas v. Anderson,* 656 F.2d 528, 532 (9th Cir. 1981); *Cooper v.Asplundh Tree Expert Co.,* 836 F.2d 1544, 1547 (10th Cir. 1988);

The Legislative history of the ADEA expressly states that there is no requirement that the beneficiary of the discrimination be under age 40. When the ADEA was introduced in the Senate Senator Javits stated:

> Section of the Bill [29 U.S.C. 623] specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 50 and 42 apply for the same job and the employer selected the man age 42. . .because he is younger than the man 52, then he will have violated the act. . .

.The test of the ADEA does not address the question presented here.

Carter v. City of Miami;,870 F.2d 578,, 582-83 (11th Cir. 1989); *D.C. Cuddy v. Carmen,* 694 F.2d 853, 857(D.C. Cir. 1982); *compare e.g., Raush v KFC Nat'l Mgt. Co.,* 10 F.3d 392, 396 (6th Cir. 1993) (standard includes replacement by a younger person)*with LaPointe v. United Autoworkers Local 600,* 8 F.3d 376, 379 (6th Cir. 1993) (*prima facie* case requires replacement from outside protected class).

113 Cong. Rec. 31,255 (1967). Senator Yarborough, the floor manager of the Bill agreed. Id.

The Under-age-40 requirement also makes no sense as a matter of policy. As the Third Circuit has stated. [i]f no intra-age group protection were provided by the ADEA it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-age animus would rarely replace them with someone under 40." *Maxfield v. Sinclair Int'l,* 766 F.2d 788, 792 (3d Cir.), *cert. denied* 474 U.S. 1057 (1986). The petitioner was denied promotions by selecting individuals under age 40 clearly out of the protective category.

The under-age-40 requirement is also irrational. What is sought to be proved is age animus. It is illogical to allow it to be proved when a 40 year old is promoted by a 39 year old, but not when a 69 year old is not promoted when a 40 year old is promoted. The situation here, denies a 56 year old in favor of a 40 year old, is clearly suggestive of age animus. See also paragraph 5 of Question 3 for discrimination animus pretextual intentional discrimination.

3) Whether the Circuit Court fundamentally altered the requirement for proof of motive in holding that petitioner failed to make out a prim facie case in some of the age, handicap, color, retaliation, sex, whistleblowing hazards to workers and public's safety, suspension from work, breach of

contract, and after the petitioner met a prima facie case in eight promotions the appeals court allowed the respondent to discriminate clearly by planned and pretextual intentional discrimination while the decision maker's motive would have the petitioner forced out of government service ?

Petitioner would urge the Court to closely examine just one of the job promotions at issue in this appeal to determine whether pretext was placed in controversy by the evidentiary record before the district court.

In Agency investigation 93-024 involving Vacancy Announcement 92-78-CL. Petitioner was not selected while a very young thirty-year-old was. As NASA concedes in brief Petitioner had an impressive length of Service with NASA, 43 technical publication credits as well as 6 patents.The Vacancy Announcement in 92-78-CL record does show that at the time the position was being considered, the eventual job selectee Daniel Dunbacher, was only thirty-four (34) years old while Petitioner was 58 years old.As Plaintiff detailed in his opposing affidavit, the selectee had only worked for NASA for six years. Petitioner had been with NASA for thirty-five (35) years. The selectee had accumulated six (6) years of supervisory experience while Petitioner had double that with fifteen (15) years of supervisory experience. Any objective comparison of the relative qualifications of Plaintiff and the selectee amply demonstrates that the process was unfair.

In Merit Promotion Job Announcement CPP-92-81-SH direct evidence in pretextual intentional discrimination is present where the decision maker filled out the request to have the position established and the decision maker wrote the selectee's name on the application to establish a position under the merit promotion announcement. This was intentional discrimination and a direct conspiracy to place an employee's name on a request to have the job established and the decision maker selected the selectee that the decision maker had named. In Position Announcement CPP-92-37-MF, like in CPP-92-81-SH the decision maker filled out the request to have the position established and the decision maker wrote the selectee's name on the application to establish a position under the merit promotion announcement. In Announcement SES HQK-001 selectee had not worked for NASA before, had defrauded on a student loan, owed $4,400 on a loan, had never handled contracts for government, was not knowledgable of government procurement system had not managed a government contract. The selectee was black and the NASAadministrator desired a black person under his affirmative action and culture diversity program and he directed the agency to go outside the government, preselected , hired, and gave the selectee a $40,000 increase in salary which violated all Civil Service rules.. This was pretextual intentional discrimination against the petitioner. This is clearly a case of fraud .

The Appeals Court failed to review the genuine dispute issues of material facts in favor of the

petitioner . *Miranda, Supra citing American and Foreign Ins. v. Colonial Mfg. Co.,* 936 F.2d 1162 , 1164 (llth Cir. 1991). The Court of Appeals should have reviewed the facts in light most favorable to the non-movant and resolved all factual disputes in the non-movant's favor. *Miranda Supra citing Lowe v. Aldridge* 958 F.2d 1565 (11th Cir. 1992) *Rollings v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987); *Barnes v. Southwest Forest Inc.,* 814 F. 2d 607, 609 (llth Cir. 1987).

The decision makers made statements directly to the petitioner that if all the old people would leave, the agency, the agency would not have a problem in keeping the young people, and the petitioner should not be seen out here late at night or in the evening that the decision maker knew 6 people that wanted to kill the petitioner, and that the problem with the work force was that it was too male, too pale, and too stale, and that the petitioner is history, that management is fixing abusive language case to get rid of the petitioner, and held management meetings to plan to set up the petitioner, solicited witnesses, and conspired, and then attempted to bribe the petitioner into retirement and drop all of the petitioner's discrimination complaints and management would drop their suspension .

Respondant admitted in Brief to the Appeal Court that the petitioner met the prima facie case on many of the job promotions.

The petitioner had 36 years of government service

and experience and 15 years of supervisory experience while many of the selectees were young, had no experience as a supervisor even though the job he sought was a supervisor job and the petitioner had far more experience in the area of the selectee, with many times the years of service and far exceeded the awards and accomplishments of the selectee. Additionally direct and indirect evidence in the case shows the petitioner had been retaliated against for filing for 23 job announcements and qualified for most of the positions and interviewed for these positions and younger, nonhandicapped, less qualified men and women ,were given the positions and clear retaliation animus from the decision maker against the petitioner for filing dicrimination complaints of retaliation against the decision makers for whistleblowing to the Office of the Special Counsel , Occupational Safety Health Administration OSHA, E.P.A., in a conspiracy for workers safety and public's safety, for retaliation in a conspiracy to setting up the petitioner for a suspension by soliciting witnesses and writing statements when no complaint was filed against the Petitioner and no witnesses to the alleged use of abusive language when the petitioner had 3 witnesses that gave affidavits that nothing happened. Pretextual and intentional discrimination against the petitioner is clearly shown by the action of decision maker in C.D. Bean's admission in his affidavit that there was no rule or law, that management used to solicite statements from individuals to give the petitioner an abusive language 21 day suspension, that it was a discretionary decision with no rule or authority.

Management abused this authority and intentionally discriminated against the petitioner. The respondent attempted to bribe the petitioner into retiring by giving him a buy out and removing the suspension from his file provided he dropped the 60 discrimination complaints against the respondent.

4) Whether the Appeals Court erred in affirming the granting of summary judgment on petitioner's claim involving breach of contract concerning the prior EEO settlement agreement and the Appeal Court rejected that contention and affirmed the grant of summary judgment, but not for the reasons stated by the district court, instead, ruling that summary judgment is proper because the agreement term that petitioner alleges NASA breached is not contained in the written settlement agreement, and for the additional reason that the agreement contains a provision specifying an exclusive procedure for remedying a breach by NASA, and petitioner's lawsuit is outside the terms of that remedy provision overlooking that the petitioner filed a proper complaint on the breach of contract with the Agency as required and appeal to Equal Employment Opportunity Commission ?

The same NASA official that was the rating supervisor was the selecting official and two of these same officials were involved in the settlement agreement and both had had EEO complaints and whistleblowing complaints filed against them by the petitioner. Under court deposition in this case Dr. George McDonough admitted that the plaintiff could

have been led to believe that he would be made a supervisor within 2 months if he would sign the settlement agreement. The Merit System Protection Board found that there was a nexus between Dr. George McDonough and him giving the plaintiff the 21 day suspension and him being involved in breaching the settlement agreement that he was one of the signers of. Joseph Randall was also involved as McDonough's subordinate in the settlement agreement and he recruited and solicited the witnesses to participate in the set up of petitioner and the witnesses admitted this in court deposition.

By the appeals court's own admission the settlement agreement was broken because the agreement specifically spelled out that the plaintiff would file a complaint when MSFC did not carry out the terms of the contract of the settlement. The breach of contract is within the terms of the settlement agreement in that the plaintiff refused to sign the settlement agreement until George McDonough promised him in good faith that he was a christian and his handshake was his bond and that if the plaintiff would sign the settlement agreement that McDonough would make him a supervisor within 2 months. The provision of the settlement agreement provides if either party was not in agreement with the agreement or broke the agreement that the settlement agreement would be broke. The petitioner was bound by his own agreement to wait to see if McDonough would honor the agreement and was told by McDonough that he could not give him the position sooner than 2 months

and that was why McDonough said that he couldn't give the plaintiff the position when the promotion to the GS-14 took place and he had to move some managers out of supervisor positions that were guilty of the discrimination against the petitioner and Teddy Edge, Ellis Baggs, Jimmy Miller and Michael Martin were named by McDonough. McDonough did remove Edge and divided Edge's team and made the petitioner a supervisor four (4) days after the Petitioner who had been deceived and had been waiting and had filed the breach of contract EEO against McDonough. The Petitioner was held in limbo waiting on NASA to honor their agreement. McDonough testified in a court deposition at the U.S. District courthouse in Huntsville, AL on Nov. 18,l 1994. "Q. You didn't agree to make him a supervisor; you just agreed to give him a chance, is that right ? A. Well, I'm not sure, but I think he could have been led to believe that I would find him a supervisory position, yes, which I did.

The district court disposed of this contention as a matter of law based upon the failure of this "agreement" to be writing. The district court held that this was an "employment agreement" and that since it was not in writing it could not be enforced.

The district court obviously erred in reaching this conclusion. First, this is not a requirement under Alabama law that an employment agreement has to

be writing. Second, the agreement for which

petitioner makes this claim was an EEO settlement, not one for employment.

> Oral Agreement to settle Title VII claim was binding and constituted a complete and enforceable agreement between parties, despite the terms not having been reduced to writing, where the petitioner professor instituted her attorneys to accept the employer-university's offer regarding the financial terms of the dispute (back pay and salary increases), although the details of the nonfinancial terms (promotion reevaluation process) still had to be worked out. ***Whittaker v. Morgan State University,*** 42 Fair Empl. Prac.Cas. (BNA) 878 (D Md. Dec. 8, 1986).

It is also noteworthy that petitioner details all of the reasons given to him as to why these specific terms could not be included in the express written language of the settlement agreement. While this alone would negate the merger concept which directed the district court, the fact that there was performance by petitioner of his responsibilities under the agreement also take the matter outside of any peceived Statute of frauds analysis.

Enforcement of EEO settlement agreements fall within the scope of federal law for enforcement. Judge Hill noted this concept in ***Eatmon v. Bristol & Iron Works, Inc.*** 729 F.2d 1503 (11th Cir. 1985) when he wrote :

> That this action for enforcement is brought by employees, not the EEOC, does not, by itself, prevent this from being an action "brought under" Title VII. All of the reasons that support Title VII jurisdiction over such actions when brought by the EEOC apply with equal force to actions brought by the aggreived employee to enforce conciliation agreements entered into by the EEOC, their employer and themselves. The congressional goal of enforcing Title VII through conciliation and voluntary compliance would be enforce in federal courts conciliation agreements between themselves their employers and EEOC

Id. at 1510 (citations omitted) As the matter of being required to be reduced to writing, that concept has been rejected. As noted in *Fulgence v. J. Ray McDermott & Co,* 662 F. 2d 1207 (5th Cir. 1981).

> Federal law does not require , however, that the settlement be reduced to writing. Absent a factual basis rendering it invalid, an oral agreement to settle a Title VII claim is enforceable against a [party] who knowingly and voluntarily agreed to the terms of the settlement or authorized his attorney to settle the dispute.

Although Appeals court stated that the plaintiff did not file a breach of settlement within the procedure spelled out in the settlement agreement,

the Petitioner did file a breach of settlement within the procedure spelled out in the settlement agreement when the Petitioner filed a breach of settlement within the requirement of the settlement agreement with NASA and the EEOC on May 20, 1991 NCN-91-MSFC-B024 & EEO Case 09120777.

Petitioner respectfully requests that this Court issue its Writ of Cetiorari to review the challenged decision of the United States Court of appeals for the Eleventh circuit and allow the Petitioner to have a jury trial.

Respectfully submitted, August 15 1996

Bobby W. Kennedy

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APPENDIX A- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
FILED MAY 20, 1996

No : 95-6863 (Docket No. 94-N-0016-M)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BOBBY W. KENNEDY

Plaintiff-Appellant,

v.

DANIEL S. GOLDIN, Administrator for the National Aeronautics and Space Administration,

Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Alabama, Middle Division

Decided and Filed May 20, 1996

Before : Dubina, Black and Carnes, Circuit Judges.

Appendix A

Bobby Kennedy appeals from the district court's grant of summary judgment against him and in favor of Daniel S. Goldin, the Administrator of the National Aeronautics and Space Administration in a lawsuit involving various job-related claims he made against NASA. He raised two issues on appeal.

First, he contends that the district court erred in granting summary judgment on his employment discrimination claims. We disagree and affirm the grant of summary judgment on those claims for the reasons stated in the district court's thorough and well-reasoned memorandum opinion.

Second, Kennedy contends that the district court erred in granting summary judgment on his claim involving breach of contract concerning the prior EEO settlement agreement. We reject that contention and affirm the grant of summary judgment, but not for the reasons stated by the district court. Instead, summary judgment is proper because the agreement term that Kennedy alleges NASA breached is not contained in the written settlement agreement, and for the additional reason that the agreement contains a provision specifying an exclusive procedure for remedying a breach by NASA, and Kennedy's lawsuit is outside the terms of that remedy provision.

AFFIRMED

APPENDIX B --JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT , DATED MAY 20 , 1996

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6863

BOBBY W. KENNEDY

Plaintiff - Appellant,

DANIEL S. GOLDIN,
Administrator for the National
Aeronautics and Space
Administration

Defendant - Appellee.

Before : Dubina, Black and Carnes, Circuit Judges

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

Appendix B

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

IT IS FURTHER ORDERED that the plaintiff-appellant pay defendant-appellee the cost on appeal to be taxed by the Clerk of this Court.

ENTERED BY ORDER OF THE COURT
s/ Miguel J. Cortez
Miguel J. Cortez,Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE : July 31, 1996

COSTS :

Printing $91.50

Total $91.50

APPENDIX C--JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION, DATED AUGUST 10, 1995

UNITED STATES DISTRICT COURT FOR THE NORTHERN DIVISION OF ALABAMA

Case No : 94-N-0016-M

BOBBY W. KENNEDY

Plaintiff,

v.

DANIEL S. GOLDIN, ADMINISTRATOR FOR THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Defendant.

JUDGMENT

In accord with the Memorandum of Opinion entered contemporaneously herewith, the defendant's motion for summary judgment is hereby GRANTED and the action is DISMISSED.

Costs are taxed in favor of the defendant and against the plaintiff.

Done this 10th of August, 1995.

Appendix C

s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

DATED : August 10, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

BOBBY W. KENNEDY,

Plaintiff,

vs. CV-94-N-0016-M

DANIEL S. GOLDIN
Administrator, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,

ENTERED
Aug 10 1995

Defendants,

Memorandum of Opinion

I. Introduction

In this civil action, plaintiff Bobby W. Kennedy ("Mr. Kennedy" or the "plaintiff") claims the defendant has deprived him of rights under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. S 601, et.seq. ("ADEA") ; the Rehabilitation Act of 1973, 29 U.S.C. S 794; Title VII, 42 U.S.C. S 2000e-3, Retaliation Employment Discrimination; Title VII, 42 U.S.C. S 2000e-2, Sex and Race Discrimination; and The Whistleblower Protection Act, 5 U.S.C. 2302(b)(8). The plaintiff also brings a breach of contract claim.

This action is presently before the court on defendant's motion for summary judgment.

II. Undisputed Material Facts

Mr. Kennedy is a white male born on September 27, 1936. He graduated from Alabama's Jacksonville

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

BOBBY W. KENNEDY,

Plaintiff,

vs. CV-94-N-0016-M

DANIEL S. GOLDIN
Administrator, NATIONAL
AERONAUTICS AND SPACE
ADMINISTRATION ENTERED

Defendants Aug 10 1995

Order

In accord with the Memorandum of Opinion entered contemporaneously herewith, the defendant's motion for summary judgment is hereby GRANTED and the action is DISMISSED.

Costs are taxed in favor of the defendant and against the plaintiff. Done, this 10th of August, 1995.

Edwin L. Nelson
United States District Judge

State University in 1958 with a bachelor's degree in chemistry and started working for the National Aeronautics and Space Administration ("NASA") in October 1960. He began at NASA as an engineering technician starting at the GS-7 level, and he currently is an AST (Aerospace Technologist) Electronics and Materials Supervisor and a deputy branch chief. Mr. Kennedy is currently a GM-14 , which he obtained as part of a settlement agreement he signed on October 4, 1990, in regard to discrimination charges he had filed with NASA's Equal Opportunity Office. Of the approximately ten people who work in the plaintiff's branch, only he and the branch cheif are at the GM-14 level.

From May 1991 to July 1993, Mr. Kennedy filed complaints with NASA's Equal Opportunity Office alleging that NASA discriminated against him based on his age and his diabetes when the agency selected other applicants for a number of jobs and a management development program that he desired. The personnel positions named in the complaints and the dates they were filed are listed as follows: (1) Supervisory, AST Electrical Systems (CPP-91-23-DC) filed on May 20, 1991 ; (2) Supervisory AST, Experimental Manufacturing Techniques (CPP-91-37-MF), filed on June 27, 1991 ; (3) Supervisory, AST, Aerospace Flight Systems (CPP-91-75-SP), filed on October 10, 1991 ; (4) Supervisory, AST, Electrical Systems (CPP-91-92-DC), filed on October 31, 1991; (5) Supervisory, AST, Electronics of Materials (CPP-92-02-RE), filed on June 15, 1992; [1]

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[1] Mr. Kennedy filed a second similar charge of discrimination on July 23, 1992, in regard to the same job.

(6) Supervisory, AST, Electrical Systems (CPP-92-47-RE), filed on July 23, 1992 ; (7) Supervisory, AST, Mission Operations Integration (CPP-92-81-SH), filed on December 4, 1992; (8) Branch Chief, filed on February 16, 1993 ; (9) Assistant Administrator for Small and Disadvantaged Business Utilization (HQK-001), filed on February 26, 1993; (10) Supervisory, AST, Technical Management (CPP-92-78-CL). filed on February 28, 1993 ; (11) Senior Executive Service Candidate Development Program, filed on July 9, 1993 ; and (12) Chief Engineer of the Space Shuttle's Main Engine, filed on July 9, 1993.[2] The individuals NASA selected for the CPP-91-23-DC position, the CPP-91-75-SP position, and the CPP-92-47-RE position are older than Mr. Kennedy. The individual selected for the CPP-91-37-MF position was less than three years younger than Mr. Kennedy, and the individual selected for the CPP-91-92-DC position was less than five years younger.

In regard to his diabetes, Mr. Kennedy stated in a number of his complaints that NASA had not considered his condiction in selecting the individuals for the jobs he desired. Mr. Kennedy's diabetes was first diagnosed in 1984, and he has never been hospitalized for his condition.

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[2] NASA consolidated a number of the complaints. The agency consolidated the two complaints listed at numbers 1 and 2 on September 13, 1991; the two complaints listed at numbers 3 and 4 on February 5, 1992; the two complaints listed at numbers 5 and 6 on October 6, 1992; and the two complaints listed at numbers 8 and 9 on March 31, 1993.

III. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. *Id. at* 322-23 ; see Fed. R. Civ. P. 56(a) and (b). There is no requirement, however, "that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Celotex,* 477 U.S. at 323.

Once the moving party has met his burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,'designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex,* 477 U.S. at 324.

The nonmoving party need not present evidence in a form necessary for admission at trial, however he may not merely rest on his pleadings. *Id.* "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

After a properly made motion has been properly responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed. 2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine wether there is a genuine issue for trial." *Id.*at 249. His guide is the same standard necessary to direct a verdict : "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*at 251-52 ; see also *Bill Johnson's Restaurants, Inc. v NLRB,* 461 U.S. 731, 745, n11, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). However, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v Zenith*

Radio Corp. 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson,* 477 U.S. at 249 (citations omitted) ; accord *Spence v. Zimmerman,* 873, F.2d 256 (11th Cir. 1989). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. *Anderson,* 477 U.S. at 254; *Cottle v. Storer Communication, Inc.,*849 F.2d 570, 575 (11th Cir. 1989). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson,* 477 U.S. at 255. The nonmovant need not be given the benefit of every inference but only of every reasonable inference. *Brown v. City of Clewiston,* 848 F.2d 1534, 1540 n.12 (11th Cir.)

IV. Discussion

A. 42 U.S.C. S 1983

The plaintiff alleges jurisdiction pursuant to 42 U.S.C. S 1983. *Plaintiff's Complaint* at 1. In *Brown v. General Services Administration,* 425 U.S. 820, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976), the Supreme Court stated that section 717 of the Civil Rights Act provides "the exclusive judicial remedy for claims of discrimination in federal employment." *Brown,* 425 U.S. at 835. See *Miener v. Special School Dist.,*580

F. Supp. 562 (E.D. Mo. 1984) (stating that Rehabilitation Act claims may not be asserted under 42 U.S.C. S 1983, aff'd in part and rev'd in part on other grounds, 800 F.2d 749 (8th Cir. 1986) ; *Paterson v. Weinberger,* 644 F.2d, 521, 524 (5th Cir. 1981) (stating that the ADEA is the exclusive remedy for age discrimination in federal employment).[3] Therefore any of Mr. Kennedy's claims pursuant to 42 U.S.C. S 1983 must be dismissed.

B. Plaintiff's ADEA Claims

Mr. Kennedy alleges that the defendant discriminated against him on the basis of age.[4]

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[3] Moreover, section 1983 provides a remedy only for actions taken under color of state law which have the effect of depriving the plaintiff of rights, provileges, or immunities protected by federal statutory or constitutional law. Unquestionably, the defendant acted under the authority of federal and not state law.

[4] Plaintiff contradicts himself in respect to the number of specific instances in which he believed he was not hired or properly rated for a job due to what he considered ongoing age discrimination. At one point in his brief, he states that his "affidavit testimony",when viewed in its entirety, clearly establishes a prima facie case of discrimination based on age, handicap, sex and EEO reprisal, by direct evidence of discriminatory intent and by meeting[McDonnell's] four-pronged test." Plaintiff's response to Movants' initial submission in Support of Movants' Motion for Summary Judgment. at 5. However, when Mr.

at 1; *Plaintiff's Response to Movants' Initial Submission in Support of Movant's Motion for Summary Judgment,at* 11, 14, 15, 16, [hereinafter *Plaintiff's Response*]. The ADEA prohibits an employer from discharging or othewise discriminating against an employee on the basis of age, U.S.C. S 623. Individuals who are at least 40 years of age, 29 U.S.C. S 631, may seek to establish a prima facie case in one of three ways : (1) by direct evidence of discriminatory intent ; (2) by meeting the four-pronged test set out for Title VII cases in *McDonnel Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 688 (1973); or (3) through statistical proof. *Carter v. City of Miami,* 870 F.2d 578, 581 (11th Cir. 1989)

I. Direct Evidence

Mr. Kennedy presents no direct evidence to show

Kennedy specifically states the type of discrimination he suffered with respect to each new position for which he applied, he only lists seven out of thirteen instances where he expressly believes a "prima facie" case of age discrimination exists pursuant to the McDonnell test. Id. at 11, 14, 15. In five others, he explicitly states that he cannot make out a prima facie case of age discrimination Id. at 8, 10, 12, 13. In one instance, where he argues that he received an improper job rating, he does not specifically state whether age was a factor. Id. at 16. Plaintiff appears to believe that age discrimination, either by direct evidence or by meeting the McDonnell test, occurred in all thirteen instances.

that the defendant used his age for discriminatory purposes. Although Mr. Kennedy states that his "affidavits clearly reveal...comments, admissions and actions [by NASA officials] to show "direct evidence of discriminatory motive," *Plaintiff's Response,*at 19, in his brief opposing summary judgment, he does not cite to direct references in his affidavits that "clearly reveal. . .direct evidence."

A complete reading of the affidavits, however, does point to two statements that the plaintiff appears to be offering as direct evidence. In one affidavit, the plaintiff testifies that two NASA employees told him of a meeting where a number of NASA employees conspired to prevent the plaintiff from becoming a section chief because of his age.[5] *Plaintiff's Affidavit in Opposition to Defendant's Summary Judgment Motion,*at 3 [hereinafter Plaintiff's Affidavit]. In the same affidavit, the plaintiff alleges one of NASA's Equal Opportunity Office Directors states that the plaintiff had been a "victim of age discrimination." [6] Id at 4. However

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[5] In the affidavit, the plaintiff states that "[M]artin, Edge, and Matheney went to John Gould and told him that he shouldn't make me the Section Chief because they were all younger than me and they wanted Martin to get the position so he could advance them. This was a conspiracy to advance themselves. I was told about the meeting between the three and Gould by Dave Nichols, my current branch chief, and Jim Carin, a co-employee, a few years after it happened. . . "*Plaintiff's Affidavit*, at 3. The plaintiff does not provide affidavits or deposition testimony from Dave Nichols or Jim Carin.

both statements the plaintiff refers to in his affidavits concern ten discrimination complaints that the plaintiff had previously resolved with NASA. See "Agreement and Memorandum of Understanding, "*Movant's Evidence Submitted in Response to Exhibit D of the Court's Order,*attach 1. The original ten discrimination complaints are not at issue in this case. Furthermore, Mr. Kennedy offers no corroborating evidence whatsoever that the individuals allegedly making the statements in fact did so,and the Federal Rules of Evidence arguably prohibits the statement NASA's EEO director alledgedly made in conjunction with the settlement agreement.[7]

In his brief opposing summary judgment, the

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[6] This statement allegedly occurred prior to the plaintiff signing a settlement agreement where the plaintiff agreed not to pursue l0 EEO complaints that he had filed against NASA, Plaintiff's Affidavit, at 4. The plaintiff further contends in the Affidavit that he signed the settlement agreement, in which NASA expressly disavows any discrimination, only after an oral promise that he would received the promotion agreed to in the settlement within two months. Plaintiff's Affidavit, at 5. Plaintiff contends in his affidavit that the settlement agreement itself constituties proof that NASA's "authorized agent[s]. . admitted the wrongful discriminatory conduct." Plaintiff's Affidavit, at 6.

[7] Federal Rule of Evidence 408 states, "Evidence of conduct or statements made in compromise negotiations is. . . . not admissible.

plaintiff cites *EEOC v. Beverage Canners, Inc.* 897 F.2d 1067 (11th Cir. 1990), to show that hostile remarks may serve as direct evidence of discriminaton. Mr. Kennedy sites that one of his NASA supervisors told him, in front of two witnesses, that the plaintiff "should not be seen out here late in the evening or at night that he knew six people that wanted to kill me." *Plaintiff's Affidavit,* at 8. However, the facts in *Beverage Canners* show that the supervisors "frequently made flagrant, revolting "remarks that specifically targeted the plaintiff's race. *Beverage Canners,* 897 F.2d at 1068. While the statement that Mr. Kennedy alleges the supervisor made toward him may be considered hostile, it does not specifically target the plaintiff's age.

In *Carter v. City of Miami,* the Eleventh Circuit stated that discriminatory remarks had to specifically show discriminatory intent, *Carter,* 870 F.2d at 582. The Eleventh Circuit has stated that "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age. . . constitute direct evidence of discrimination." *Carter,* 870 F.2d at 582. Comments that are merely inappropriate and condescending are not recognized as direct evidence. *Barnes v. Southwest Forest Industries, Inc.* 814 F.2d 607, 611 (11th Cir. 1987, cert. denied, 467 U.S. 1204, 104 S. Ct. 2385, 81 L. Ed. 2d 344 (1984). For example, the Eleventh Circuit has stated that direct evidence of a discriminatory nature existed where an experienced school principal and a superintendent of education testified "unequivocally" that racial motivation was present in the discharge of several school employees. *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769

(1982). The Eleventh Circuit also found direct evidence of discrimination where a plaintiff and a union representative testified that an employer expressly stated that he refused to place the plaintiff in a certain job position because she was a woman. *Bell v. Birmingham Linen Service,* 715 F.2d 1552, 1553 (11th Cir. 1983), cert. denied, 467 U.S. 1204, 104 S Ct. 2385, 81 L. Ed. 2d 344 (1984). The Eleventh Circuit has stated that if alleged statements constitute direct evidence of discrimination, "the lower court must, as an initial matter, specifically state whether or not it believes plaintiff's proffered direct evidence of discrimination." *Thompkins v. Morris Brown College,* 752 F.2d 558, 564 (1985). Mr. Kennedy's affidavits fail to provide any direct evidence comporting with the Eleventh Circuit's standard in *Carter*to show age discrimination.

In eleven of his discrimination complaints filed with NASA, Mr. Kennedy explicitly states that the defendant discriminated against him "[b]ecause of my age, . . .which was not considered when the selection was made." *Movant's Initial Submission in Response to Exhibit D of the Court's Order,* attachs. 3,4,15,16,26,27,28,36,43,54,62 (emphasis added). An employer that prevents a job candidate's age from entering the application process does not violate the ADEA. *Williams v. General Motors Corp.* 656 F.2d 120, 129 (5th Cir. 1981) (stating that the "ADEA mandates that an employer reach employment decisions without regard to age. . . .[and] does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group"), cert. denied, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982).

2. The McDonnell Douglas Test

The defendant provides legitimate, nondiscriminatory reasons for not providing the plaintiff with each job advancement, program placement, or performance rating which the plaintiff desired. The plaintiff was unable in each instance to provide evidence that the defendant's reasons were pretextual or that discriminatory intent more likely motivated the defendant.

In the absence of direct evidence of discrimination the court may utilize the framework established in *McDonnell Douglas Corp. v. Green* and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). First, the plaintiff bears the burden of proving by a preponderance of the evidence a prima facie case of discrimination, *Burdine*, 450 U.S. at 253, which "in effect creates a presumption that the employer unlawfully discriminated against the employee." Id. at 254. Second, if the plaintiff carries his initial burden, the burden shifts to the defendant to rebut the presumption by articulating "some legitimate reason" for the employment decision at issue. *Burdine*, 450 U.S. at 253 (quoting McDonnell Douglas, 411 U.S. at 802). Finally, the plaintiff bears the burden of showing that the defendant's proffered reasons are pretextual or that discriminatory intent was more likely the cause of the employer's actions. *Burdine* 450 U.S. at 253, 256. Presentation of a prima facie case creates a rebuttable presumption of discrimination, but it does not alone establish a genuine issue of material fact sufficient to go to the jury. *Carter*, 870 F.2d at 585. Because the plaintiff bears the burden of establishing

pretext, once the defendant offers a legitimate, non-discriminatory reason for an adverse employment action, the plaintiff must present significantly probative evidence of the issue to avoid summary judgment. Id. The plaintiff at all times retains the ultimate burden of persuading the trier of fact that the employer discriminated against the plaintiff. Burdine, 450 U.S. at 253.

To establish a prima facie case under the ADEA with circumstantial evidence, a plaintiff must prove : (!) that he is a member of the protected group; (2) that an adverse employment action was taken against him, e.g. discharge, demotion, or failure to hire or recall; (3) that the person hired was from outside the protected group; and (4) that he was qualified for the position for which he was rejected. *Carter*, 870 F.2d at 582 (citations omitted). The prima facie case requirement was "never intended to be rigid, mechanistic, or ritualistic." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 597 (1978). However, "[a]prima facie case may be established only when there is a basis for inferring that discrimination is the reason for the employment decision. . . . " *Pace v. Sothern Ry. Sys.*, 701 F.2d 1383, 1390 (11th Cir.), cert. denied, 464 U.S. 1018, 104 S., Ct. 549, 78 L. Ed. 2d 724 (1983)

In his brief opposing defendant's motion for summary judgment, Mr. Kennedy admits that he cannot establish a prima facie case of age discrimination to satisfy the *McDonnel Douglas* test in five instances where he alleges discriminatory hiring practices. Assuming without deciding that the plaintiff has established a prima facie case in the eight instances where the plaintiff does claim age

discrimination, the defendant satisfies its burden of production by articulating a legitimate nondiscriminatory reason for not granting Mr. Kennedy the specific job advancement, program placement, or performance rating that he desired.

a. CPP-91-92-DC

The defendant contends that NASA hired a more qualified individual for the position of Supervisory, AST, Electrical Systems (CPP-91-92-DC). The defendant presented evidence that one of the decision makers believed that Mr. Kennedy's answers to a questionnaire concerning an electrical power system wee not as adequate as other candidates' answers. Affidavit of John R. Lanier, *Movant's Evidence Submitted in Response to Exhibit D of the Court's Order,* attach. 19. Both decision makers believed that the person hired for the CPP-91-92-DC position had much more experience in electrical power systems. Affidavit of J. Kenneth Stephens, *Movant's Evidence Submitted in Response to Exhibit D of the Court's Order,*attch. 18; Affidavit of John R. Lanier, *Movant's Evidence Submitted in Response to Exhibit D of the Court's Order,* attch. 19.

In response to the defendant's nondiscriminatory reason for selecting another candidate for the CPP-91-92-DC position, the plaintiff fails to show that the defendant's reasons are pretextual or that discriminatory intent was more likely the cause of the defendant's actions. Mr. Kennedy responded that he had published 43 technical reports and that the selectee had not listed any technical report publications. He also alleges that the decision maker

had a conflict of interest. *Plaintiff's Affidavit*, at 13. The plaintiff does not explain exactly what a technical report is or which of the 43 technical reports contain subjects relevant to the CPP-9L-92-DC job's specific qualifications[8] The plaintiff states that the decision maker had a conflict

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[8] The plaintiff provides a list of his written reports. The list numbers from 1 to 43, but numbers 24 through 36 are entitled "Tests Reports". Only numbers 1 through 23 and 37 through 43 are entitled "Technical Reports". The list is as follows : (1) Effects of Gamma Radiation on Selected Potting Compounds and Insulating Materials (2)Evaluation of Adhesive for Installing Flat Conductor Cables (3) Electronics Packaging Materials and Test Equipment, (4) Evaluation of Polymeric materials for Electronic Packaging. (5) Electronic Packaging Materials, (6) Fundamentals of Materials Used for Electrical Insulating and Packaging, (7) Evaluation of Conformal Coating Materials for Printed Circuit Boards, (8) Comparison Tests of This Film Conformal Coating Material, (9) Improved Method of Manufacturing Multilayer Printed Wiring Boards, (10) Effects of Radiation on Electronic Packaging Materials, (11) High Temperature Polyimides for Electrical Equipment, (12) Reliability Testing of Multilayer Printed Circuit Boards, (13) Conformal Coating of Cordwood Modules with Polyurethane, (14) Outgassing Contamination of Dielectric Material Used in ATM, (15) Outgassing Contamination and Gas Analysis of Dielectric Materials Used in the ATM Program, (16) Outgassing Contamination Report, presented at the ATM

of interest because the decision maker also prepared Form 3778, concening a supervisor's appraisal of performance. The plaintiff does not specifrically state that Form 3778 played a role in determining who received the CPP-91-92-DC position, but the plaintiff implies that it did . Still, Mr. Kennedy does not explain how the alleged conflict of interest shows pretext in relation to his age discrimination claim. See *Nix v WLCY Radio/Rahall Communications,* 738 F.2d 1181, 1187, (11th Cir. 1984) (stating that although an employer may have made its decision hased on erroneous or incomplete facts, the law will not censure its decisions as long as it is not for a

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Contamination Program Review at MSFC, (17) Pressure Molding for Electronic Components, (18) Monolithic Microcircuit Capability in the Technology Division, (19) Beam Leads for MOS Integrated Circuits, (20) A New Lay-Expansion Nonflammabie Printed Ciricuit Board, (2l) Guidelines for Dielectrics and Metals Used in Packaging Monolithic Circuits, (22) Monolithic Microcircuit Techniques and Processes, (23) Integrated Circuits Produced in the Astrionics Laboratory, (24) Re-Evaluation Polyurethane Elastomeric Compound Products Research PR-1548-B, (25) Re-Evaluation Polyurethane Elastomeric Compound Products Research PR-1538-A, (26) Evaluation Polyurethane Elastometric Compound Product Research PR-l538-B, (27) Evaluation Polyurethane Elastomeric Compound Hysol Cu-24 (clear), (28) Evaluation Polyurethane Elastomeric Compound Products Research PR-1538-S (Clear), (29) Reevaluation Polyurethane Elastomeric Compound Churchill 30-907,

discriminatory reason); *Harvey v. Anheuser-Busch, Inc.*, 38F.3d 968, 973 (8th Cir. 1994) (quoting *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) ("Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions . . . Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior.")

Defendant also alleges that the individuals involved in making the decision for the CPP-91-92-DC position were involved in a "conspiracy to violate [his] civil rights." *Plaintiff's*

Type III, (30) Re-evaluation Polyurethane Elastomeric Compound 4712, (31) Re-evaluation Polyurethane Potting and Molding Compound Coast Pro-Seal 796-68, (32) Re-evaluation Potting and Molding Compound Chem-Seal 3547, (33) Re-evaluation Polyurethane Potting and Molding Compound Coast Pro-Seal 796-80, (34) Re-evaluation Polyurethane Elastomeric Compound PRS-1538, (35) Re-evaluation Polyurethane Elastomeric Compound Coast 794, Type III, (36) Evaluation Polyurethane Elastomeric Compound CS-3547, Type III, (37) Thermally Grown Oxides and Diffusions for Automatic Processing of Integrated Circuits, (38) Chemical Vapor Deposition for Automatic Processing of Integrated Circuits , (39) ION Implantation for Automatic Processing of Integrated Circuits, (40) Photolithography Automatic Alignment for Integrated Circuits. (41) Chemical Etching for Automatic Processing of Integrated Circuits, (42) A new low-expansion Non-Flammable

Affidavit, at 13. Since the plaintiff provides no substantial evidence that such a conspiracy in fact exists, the plaintiff's assertions are merely conclusory and too tenuous to establish a reasonable inference that NASA officials collectively agreed to violate Mr. Kennedy's rights.[9] In *Fullman v. Graddick*, 739 F.2d 553,557 (11th Cir. 1984), a case in which the plaintiff alleged his civil rights had been violated, the Eleventh Circuit stated that conclusory, vague, and general allegations of a conspiracy are not sufficient to oppose a motion for summary judgment. In *Young v. General Foods Corp.*, 840 F.2d 825 (11th Cir. 1988) the Eleventh Circuit said that "because the plaintiff bears the burden of establishing pretext, he must present 'significantly probative'evidence on the issue to avoid summary judgment." Id. at 829 (citing Celotes Corp. v. *Catrett*, 477 U.S. 317, 322-23, 106 S Ct. 2548, 2552-53, 91 L.Ed. 2d 265 (1986).

b. CPP-92-81-SH

The defendant contends that NASA hired a more

Printed Circuit Board, and (43) Metallization and automatic Processing of Integrated Circuits. *Plaintiff's response to Movants' Initial Submission in Support of Movants' Motion for Summary Judgment Pursuant to Exhibit D of this Court's Order, Plaintiff's Exhibit 2(a), at 2la-26 to 2la-28.*

[9] The total count of alleged conspirators is hard to determine from the plaintiff's affidavits. One is not always sure whether a named individual is or is not a party to the alleged comspiracy.

qualified individual for the position of Supervisory, AST, Mission Operations Integration (CPP-92-81-SH). The defendant presented evidence that the decision maker took notice that Mr. Kennedy's supervisory experience was limited to materials and electrical components analysis, not flight operations, which the position required. Affidavit of Carolyn S. Griner, Movant's Evidence Submitted in Response to Exhibit D of the Court's Order, attach. 39. The decision maker stated that the person selected had extensive experience in flight operations management. Id.

Kennedy also fails to show that defendant's articulated reasons for selecting another candidate for the CPP-92-81-SH position are pretextual. The plaintiff again refers to his 43 published technical reports, while stating that the person selected had not published any technical reports. The plaintiff also states that he had acquired six patents for the U.S. government and that the person selected had acquired none. However, the plaintiff does not attempt in his affidavit to explain how his published technical reports and patents and the selectee's alleged lack thereof specifically showed pretext or discriminatory intent in relation to age discrimination. See Nix, 738 F.2d at 1187 (the employer's reason must be a discriminatory one). Mr. Kennedy does not explain how the published technical reports and patents specifically related to flight operations, the requisite skill required for the CPP-92-81-SH position. At one point in trying to show pretext or discriminatory intent, Mr. Kennedy states that the decision maker for the CPP-92-81-SH position "admitted that she did not know my age."

Plaintiff's Affidavit, at l4. If the selecting official did not even know Kennedy's age, he would be hard pressed to prove that official discriminated against him because of his age. Williams, 656 F.2d at l29 ("The ADEA mandates that an employer reach employment decisions without regard to age.") Rather, he contends in his affidavit that the decision maker relied on a rating system influenced by an individual who was part of the conspiracy that Mr. Kennedy believed violated his civil rights. Plaintiff's affidavit, at l3-l4. As previously stated, Mr. Kennedy Offers no substantial evidence that such a comspiracy exists. Fullman, 739 F.2d at 557 (stating that mere allegations of a conspiracy are insufficient).

c. Branch Chief

The defendant contends that NASA hired a more qualified individual for the Branch Chief position. The defendant presented evidence that the decision maker believed that the fifty-year old candidate ultimately selected "would be a better supervisor because of the way he handled himself with people and in interfacing with other organizational elements of the Center." Affidavit of Joseph L. Randall, Movant's Evidence Submitted in Response to Exhibit D of the Courts Order, attch. 47. To show that the defendant's stated reasons were pretextual, Mr. Kennedy testifies that "the materials contained in this ROI [Report of Investigation] contain convincing evidence that this was age. . . . discrimination." Plaintiff's Affidavit, at l4. He does not attempt to explain in his affidavits (nor does his attached evidence shed light) as to exactly where ROI 93-024

can be found or what would be found if the court were able to examaine it. See Young, 840 F.2d at 829 (stating that plaintiff must present significantly probative evidence).

d. CPP-92-78-CL

The defendant contends that NASA hired a more qualified individual for the position of Supervisory, AST, Technical Management (CPP-92-78-CL). The defendant presented evidence that the decision maker did not select Mr. Kennedy because he had minimal experience in the design, development, integration, and testing of propulsion system components, which the Technical Management job required. Affidavit of Edwin P. Jacobs, Movant's Evidence Submitted in Response to Exhibit D of the Court's Order, attch. 49. The decision maker stated that the selected person's entire work experience was in propulsion systems. Affidavit of Edwin P. Jacobs, Movant's Evidence Submitted in Response to Exhibit D of the Court's Order, attach. 49, In response to the defendant's nondiscriminatory reason for selecting another candidate for the CPP-92-78-CL position, the plaintiff fails to show that the defendant's reasons are pretextual. The plaintiff alleged that he worked for NASA longer than the selectee; that, unlike the plaintiff, the selectee had no awards, presentations, or published technical reports; and that the selectee had only attended three training courses compared to the plaintiff's thirty-four. Plaintiff's Affidavit, at 15. Again, the plaintiff did not attempt in his affidavit to explain how his published technical reports, his awards, his presentations, and his 34

training courses, and the selectee's lack thereof, specifically showed pretext or discriminatory intent in relation to age discrimination. See Nix, 738 F.2d at 1187 (the employer's reason must be a discriminatory one). Plaintiff did not explain how the published technical reports, awards, presentations, and training courses specifrically related to flight operations, the requisite skill required for the CPP-92-78-CL position. Mr. Kennedy also relies on his conspiracy theory , Plaintiff's Affidavit, at 15, of which he presents no evidence. Fullman, 739 F2d at 557 (stating that mere allegations of a conspiracy are insufficient).

e. Assistant Administrator for Small and Disadvantaged Business Utilization

The defendant contends that NASA hired a more qualified individual for the position of Assistant Administrator for Small and Disadvantaged Business Utilization. The defendant presented evidence that the decision maker did not choose Mr. Kennedy from an applicant pool of over 80 people because Mr. Kennedy lacked the requisite level of experience that the vacancy announcement specifrically required. Movant's Evidence Submitted in Response to Exhibit D of the Court's Order, attachs. 57-61. The vacancy announcement required a GS/GM-15 level or its equivalent. Mr. Kennedy only had a GM-14 level and, according to the decision makers, no adequate equivalent. Movant's Evidence Submitted in Response to Exhibit D of the Court's Order, attachs. 57-60. To rebut defendant's legitimate, nondiscrim-

natory reasons, the plaintiff alleges that he has worked longer for the federal government than the selectee and the selectee once defaulted on a student loan. Plaintiff's Affidavit, at. 15-16. Neither fact, if true,specifically points to pretext or discriminatory intent with regard to age discrimination. Plaintiff also alleges that he did not receive the Assistant Administrator position because of the collective involvement of five NASA officials who discriminated against him on the basis of age. Plaintiff's Affidavit, at 16. Since the plaintiff provides no evidence in support of these assertions, they are merely conclusory and too tenuous to establish a reasonable inference that the defendant's action was the product of a conspiracy. *Fullman*, 739 F.2d at 557 (stating that mere allegations of a conspiracy are sufficient).

f. Executive Service Candidate Development Program

The defendant contends that NASA selected more qualified individuals for the NASA Executive Service Candidate Development Program. The defendant presented evidence that the decision makers chose only GS/GM-15 candidates and not GS/GM-14 candidates, of which Kennedy was one. *Movant's Evidence Submitted in Response to Exhibit D of the Court's Order,* attachs. 65-67. One decision maker stated that since a large number of highly-qualified GS/GM-15 personnel applied, GS/GM-14 candidates were not even considered. Affidavit of Carolyn S. Griner, *Movant's Evidence Submitted in Response to Exhibit D of the Court's Order,* atttach. 66. The

plaintiff's only evidence to rebut defendant's nondiscriminatory reason is that plaintiff had more experience working for the federal government, more published technical reports, and more patents than the selected candidates. *Plaintiff's Affidavit*, at 17. Even if true, that fact, standing alone, is not necessarily probative of showing pretext or discriminatory intent in regard to the plaintiff's age. See *Young*, 840 F.2d at 829 (stating that plaintiff must present significantly probative evidence).

g. Chief Engineer, Space Shuttle Main Engine Project

The defendant contends that NASA hired a more qualified individual for the position of Chief Engineer of the Space Shuttle's Main Engine Project. The defendant presented evidence that Mr. Kennedy, with his bachelor's degree in chemistry, did not have the required engineering or physical sciences degree and that Mr. Kennedy did not have adequate experience in working with high technology liquid propulsion rocket engines. *Movant's Evidence Submitted in Response to Exhibit D of the Court's Order*, attach. 70. The vacancy announcement for the position had stated that the position's requirements included a knowledge of engineering and scientific principles and engineering and scientific practices applied to high technology liquid propulsion rocket systems. *Movant's Initial Submission in Response to Exhibit D of the Court's Order*, at 12; *Plaintiff's response to Defendant's Statement of Undisputed Facts Pursuant to Exhibit D. of the Court's Order*, at 10. The plaintiff's only

evidence to rebut the defendant's nondiscriminatory reason is that the plaintiff had served at NASA for more years (34 vs. 23) and had served in a supervisory role for more years (15 vs. 7). Plaintiff fails, though, to show how this fact overrides defendant's claim that the plaintiff lacked the adequate experience in working with high technology liquid propulsion rocket engines. See *Young*, 840 F.2d at 289 (stating that plaintiff must present significantly probative evidence).

h. Plaintiff's "Fully Successful" Rating

The defendant contends that NASA Deputy Chief Michael D. Martin had adequate reasons for giving Mr. Kennedy a "fully successful" rating as opposed to a "highly successful" rating. The defendant provided evidence that Mr. Martin evaluated Mr. Kennedy's work by contacting a number of individuals who worked with the plaintiff on specific projects and by evaluating a chemical hygiene plan the plaintiff claimed to have prepared. Michael D. Martin, Memorandum for Record, *Movant's Evidence Submitted in Response to Exhibit D of the Court's Order,* attach. 75. The plaintiff believes that Mr. Martin is a member of the conspiracy among NASA officials to violate his civil rights. *Plaintiff's Affidavit,* at 13. The plaintiff again, however, fails to provide evidence that such a conspiracy exists. *Fullman,* 739 F.2d at 557 (stating that mere allegations of a conspiracy are insufficient). Thus this claim must also fail.

Although Mr.Kennedy alleges that Mr. Martin made a hostile remark to him in front of two

witnesses, even if found true, the statement (that Mr. Martin knew six people who wanted to kill the plaintiff) is not specifically probative of age discrimination. See *Young*, 840 F.2d at 829 (stating that plaitiff must present significantly probative evidence); *See generally Carter,* 870 F.2d 578 (stating that inappropriate and condescending language falls short of showing direct evidence of discrimination) : *Walker v. Nationsbank of Florida,* 53 F. 3d 1548 (11th Cir. 1995) ("Serious personality clashes may be an unwelcome reality of the work-place, and may lead, as in this case, to unfortunate consequences for employees such as Walker. Nevertheless, such clashes do not, without more, form the basis for relief under Title VII or the ADEA.")

3. Statistical Evidence

The plaintiff has presented no statistical evidence that demonstrates a pattern and practice of age discrimination. Even if the plaintiff had statistics "are of relatively low importance in an individual disparate treatment case." *Gilty v. Village of Oak Park,* 919 F.2d 1247, 1253 n.8 (7th Cir. 1990). The Eleventh Circuit has stated that "statistics alone cannot make a case of individual disparate treatment." *Carmichael v. Birmingham Saw Works,* 738 F.2d 1126, 1131 (11th Cir. 1984).

C. The Rehabilitation Act

Mr. Kennedy alleges that the defendant discriminated against him on the basis of his diabetes. *Plaintiff's Complaint*, p.1. Mr. Kennedy

states that when his diabetes causes his blood pressure to rise, he "cannot function so as to be able to concentrate, get along with other people." *Plaintiff's Response to Movants' Initial Submission in Support of Movants' Motion for Summary Judgment Pursuant to Exhibit D of This Court's Order,* at 8 [hereinafter *Plaintiff's Response*]. He further alleges that it is the "aggravation of his handicapping diabetes disability . . . brought on by the stress he continually suffers as a result of the defendants' wrongful continuing . . . discrimination" that causes his rise in blood pressure. Plaintiff's response, at 8. Mr. Kennedy traces the root cause of his aggravated diabetes to the conspiracy he alleges that younger NASA officials instigated in an effort to promote themselves over him. *Plaintiff's Affidavit,* at 3-4. The plaintiff contends that if the defendant halted the alleged discriminatory practices, "that would be all the reasonable accomodation that the plaintiff would need to do this job." *Plaintiff's Response,* at 9.

The Rehabilitation Act prohibits an employer from discharging or otherwise discriminating against an employee on the basis of a disability, 29 U.S.C. S 794. The Eleventh Circuit has stated :

> To prove discrimination under the [Rehabilitation] Act, a plaintiff must show that he or she : (l) is "handicapped" within the meaning of the Act and relevant regulations, (2) is "otherwise qualified" for the position in question , (3) worked for a program or activity that received federal financial assistance; and (4) was adversely treated solely because of his or her handicap.

Jackson v. Veterans Administration, 22 F.3d 277, 278 (11th Cir.), cert. dismissed, 115 S. Ct. 657, 130 L. Ed.2d 560 (1994) [10]

If a plaintiff cannot establish a violation of the Rehabilitation Act with direct evidence of discriminatory intent, a plaintiff can apply the *McDonnel Douglas* analysis. *Wood v. President and Trustees of Spring Hill College*, 978 F.2d 1214, 1223 (11th Cir. 1992) (applying the McDonnel Douglas analysis to the Rehabilitation Act).

1. Direct Evidence

Mr. Kennedy does not present direct evidence to show that the defendant used his diabetes to discriminate against him, which he alleges throughout his affidavits. Just as he does in his claim for age discrimination, the plaintiff states in his brief that his "affidavits"clearly reveal. . . comments, admissions and actions [by NASA officials]" to show "direct evidence of discriminatory motive."

In attempting to prove that the defendant violated the rehabilitation Act, Mr. Kennedy primarily relies on the same evidence in his affidavits that he offers to prove his ADEA claim. Throughout his affidavits, he continuously points to his 43 published technical reports, his 34 training courses, his six patents, his

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[10] This court does not decide whether the plaintiff is "'handicapped' within the meaning of the Act" or whether the plaintiff is "otherwise qualified" for the position in question," At issue is whether the plaintiff was adversely treated solely because of his handicap.

30-plus years at NASA, his 15 years as a supervisor, and his awards. All of his discussion about his meritorious work history does not, as the statute requires, show that NASA discriminated against Mr. Kennedy "solely by reason of . . . his handicap." 29 U.S.C. S 794(a). As the Eleventh Circuit stated in *Castle v. Sangamo Weston, Inc*, 837 F.2d 1550 (11th Cir. 1988), direct evidence "proves existence of fact in issue without inference or presumption." Id. at 1558 n.13 (quoting Black's Law Dictionary 413 (5th ed. 1979).

Whether he contends that the decision makers knew of his handicap and used that knowledge to discriminate against him is a point of debate with Mr. Kennedy himself. In his affidavit, Mr. Kennedy testifies, "All of the selecting officials knew that I was handicapped. I had supplied a self identification handicap Form 256 with every one of my SF 171 applications when I filed for the positions. The selecting official perceived me as handicapped and unable to think because of the diabetes and perform the duties of the job the way they wanted them performed." *Plaintiff's Affidavit,*, at 10. In the same affidavit, Mr. Kennedy states, "Carolyn Griner, selecting official, admitted that she did not know I was handicapped. . . " Plaintiff's Affidavit, at 14 (emphasis added). When discussing the CPP-94-47-RE position, Mr. Kennedy testifies that "Rita Evans McCoy removed my 256 Self Identification of Handicap, diabetes, and other documents that show my qualification for the position . . . ." Plaintiff's Affidavit, at 14, In eleven of the discrimination complaints he filed with NASA, Mr. Kennedy stated that the defendant discriminated

against him [b]ecause of my. . .handicap. . . which was not considered when the selection was made." *Movant's Initial Submission in Response to Exhibit D of the Court's Order*, attachs 3,4,15,16,26,27,28, 36,43,54,62 (emphasis added). Mr. Kennedy incorrectly believes that he was discriminated against because his handicap was not considered in the decision making process. Under 29 U.S.C. S 794(a), an employer cannot discriminate against a qualified individual "solely by reason of his or her handicap." If the employer does not consider the handicap in the decision making process, an individual cannot then claim that the employer used the handicap as a means to discriminate.

2. The McDonnell Douglas Test

The defendant provides legitimate, nondiscriminatory reasons for not providing the plaintiff with each job advancement, program placement, or performance rating which the plaintiff desired. The plaintiff was unable in each instance to provide evidence that the defendant's reasons were pretextual or that discriminatory intent was more likely the cause.

Assuming without deciding that the plaintiff has established a prima facie case in the thirteen instances where defendant claims a violation of the Rehabilitation Act, the defendant satisfied its burden of production by articulating a legitimate nondiscriminatory reasons for not hiring the plaintiff in the othe five jobs at issue.

a. CPP-91-23-DC and CPP-91-37-MF

For the jobs Supervisory, AST, Electrical Systems (CPP-91-23-DC) and Supervisory, AST, Experimental Manufacturing Techniques (CPP-91-37-MF), the decision makers stated that they used a questionnaire to interview candidates and to determine which ones were best qualified for the management and technical aspects of the jobs. Affidavit of James Kenneth Stephens, *Movants' Initial Submission in Response to Exhibit D of the Court's Order,*attach. 5 ; Affidavit of Paul H. Schuerer, *Movants' Initial Submission in Response to Exhibit D of the Court's Order,* attach 6. From the responses, the decision makers determined that candidates other than Mr. Kennedy would receive the positions. Although Mr. Kennedy was listed as one of five names as "Best Qualified Applicants" for the CPP-91-37-MF position and his name appeared in all awards categories (no other candidate's name for the CPP-91-37-MF position did so). *Movants' Initial Submission in Response to Exhibit D of the Court's Order,* attach. 10, the defendant still can select the candidate that the defendant believes is better suited for the job."[11] *Harvey v. Anheuser-Busch, Inc.* 38 F.3d 969,973 (8th Cir. 1994) ("Federal courts do not sit as

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[11] The individual ultimately selected for the CPP-91-37-MF position also appeared on the list of names of "Best Qualified Applicants," and his name appeared in three out of four award categories. *Movants' Initial Submission in response to Exhibit D of the Court's Order,* attach.10.

a superpersonnel department that reexamines an entity's business decisions.") (quoting *Elrod v. Sears, Roebuck and Co.* 939 F.2d 1466, 1470 (11th Cir. 1991) *Jackson*, 22F.3d at 278 (stating that the plaintiff must be adversely treated solely because of his handicap.).

In response to the defendant's nondiscriminatory reason for selecting another candidate for the CPP-91 23-DC position, Mr. Kennedy alleged that the decision maker used a form that NASA subsequently stopped using because it allowed individuals to promote their friends. Plaintiff's Affidavit, at 12. Even if that is true, it does not show that the defendant's nondiscriminatory reason was merely pretextual or that discriminatory intent was more likely the cause of the defendant's actions. Mr. Kennedy fails to show how the form was specifically used as a means to discriminate against him based on his handicap. *Young,* 840 F.2d at 829 (stating that in establishing pretext, the plaintiff must present significantly probative evidence). Mr. Kennedy also points to his six patents and awards, all of which do not reveal pretest or discriminatory intent. *Plaintiff's Affidavit,* at 12. Concerning the CPP-91-37-MF position, Mr. Kennedy offers no evidence in regard to handicap discrimination to rebut the defendant's nondiscriminatory reason. He states that he had been a supervisor longer than the selectee, that he had more patents, and that one of the individuals involved in the decision making process had retaliated against him because of a prior discrimination complaint the plaintiff had filed against him. *Plaintiff's Affidavit,* at 12-13. However, the plaintiff offers no explanation as to how the patents and awards show pretext or discriminatory motive, and

he offers no evidence that the selectee was retaliating against him because of prior discrimination complaints. Young, 840 F.2d at 829 (stating that in establishing pretext, the plaintiff must present significantly probative evidence).

b. CPP-91-75-SP

For the position of Supervisory, AST, Aerospace Flight Systems (CPP-91-75-SP), the decision maker stated that an applicant with an engineering degree was best suited for the position, a degree that Mr. Kennedy did not possess. [12] Affidavit of Robert E. Smith, *Movant's Initial Submission in Response to Exhibit D of the Court's Order,* attach. 20. The decision maker stated that the selectee had to manage a complex system composed of structural, mechanical, thermal, and electrical systems, whereas Mr. Kennedy's background did not cover all of the requisite areas. Id. The person ultimately selected for the position had worked in the spacelab program from its inception. Id. In response to the defendant's nondiscriminatory reason for selecting another candidate for the CPP-91-75-SP position , the plaintiff again states that he had six patents and the selectee allegedly had none. Plaintiff's Affidavit, p. 13. He testifies that the individuals involved in the decision making process either had a conflict of interest or were retaliating against him for filing past discrimination complaints. None of these statements

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[12] Mr. Kennedy has a bachelor's degree in chemistry from Jacksonville State University, *Deposition of Bobby W. Kennedy,* at 6.

reveal an intent to discriminate based on Mr. Kennedy's diabetes, and none are significantly probative of whether defendant's nondiscriminatory reasons were a pretext to hide handicap discrimination. Young, 840 F.2d at 829 (stating that in establishing pretext, the plaintiff must present significantly probative evidence).

c. CPP-93-47-RE

For the position, Supervisory, AST, Electrical Systems (CPP-92-47-RE), the decision maker stated that although Mr.Kennedy had a "good background", the decision maker believed that the selectee had stronger leadership ability and a better knowledge of divisional organization, having been a part of the organization from its inception. Affidavit of David N. Schultz, *Movants' Initial Submission in Response to Exhibit D of the Court's Order,* attach. 30. In response to the defendant's nondiscriminatory reason for selecting another candidate for the CPP-92-47-RE position, the plaintiff alleged that information was removed from his files that would have better shown his qualifications. *Plaintiff's Affidavit,* at 14. Mr. Kennedy provides no evidence, other than his naked claim, that this took place. *Young,* 840 F.2d at 829 (stating that the plaintiff bears the burden of establishing pretext). One piece of information that Mr. Kennedy alleges was removed from his file was a form documenting his handicap, which if true, would have prevented the decision maker from knowing of his handicap.

d. CPP-92-02-RE

For the position advertised under CPP-92-02-RE, the decision maker stated that the selectee had the necessary experience in payload planning and knowledge of the Office of Commercial Programs, whereas Mr. Kennedy did not. Affidavit of Herman P. Gierow, *Movant's Initial Submission in Response to Exhibit D of the Court's Order,* attach. 31. In response to the defendant's nondiscriminatory reason for selecting another candidate for the CPP-92-02-RE position, the plaintiff alleged that he had management experience and the selectee had none. Plaintiff's Affidavit, at 14. He alleged that he had written more technical reports and had more patents than the selectee. Plaintiff's Affidavit, at 14. Such information is not significantly probative to show that the defendant's nondiscriminatory reasons were pretextual or that defendant acted with discriminatory motive. Mr. Kennedy claims that documents, including 2,706 pages from an affidavit he submitted, had been removed from his files. Plaintiff's Affidavit, p. 14. Again, Mr. Kennedy offers no evidence, other than his bare allegation, that this took place. *Young*, 840 F.2d at 829 (stating that the plaintiff bears the burden of establishing pretext).

3. Statistical Evidence

The plaintiff has presented no statistical evidence that demonstrates a pattern and practice of discrimination in violation of the Rehabilitation Act.

D. Retaliation Employment Discrimination

Title VII, 42 U.S.C. & 2000e-3, makes it unlawful for an employer to discriminate against any employee or applicant because that person opposed an unlawful employment practice. To establish a prima facie case of retaliation employment discrimination, the plaintiff must show "(l) that she engaged in statutorily protected activity. (2) that an adverse employment action occurred, and (3) that the adverse action was causally related to the plaintiff's protected activities." *Coutu v. Martin County Bd. of County Commissioners,* 47 F.3d 1068, 1074 (11th Cir. 1995). Filing a complaint with an EEO office is a statutorily protected act. See *Hairston v. Gainesville Sun Publishing Co.,*9 F.3d 913, 920 (11th Cir. 1993). To prove a causal link under the third requirement. "' a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated.'" *Coutu,* 47 F.3d at 1074.

If a plaintiff cannot prove retaliation discrimination with direct evidence, he may use the *McDonnell-Douglas* test. See *Hairston,* 9 F.3d at 920. Assuming without deciding that the plaintiff has established a prima facie case of retaliation discrimination, the defendant satisfied its burden of production by articulating a legitimate, nonretaliatory reason for not granting Mr. Kennedy the specific job, program placement, or rating that he desired. These legitimate, nonretaliatory reasons are set forth in section IV.B.2 and IV.C.2 of this opinion.

Mr. Kennedy does not present direct evidence to show that the defendant retaliated against him due to

his filing a number of discrimination complaints. [13] Just as he doeos in his claims for age and handicap discrimination, he states that his "affidavits clearly reveal. . .comments, admissions and actions [by NASA officials]" to show "direct evidence of discriminatory motive. "Plaintiff's Response, at 19. However, just as in his age and handicap discrimination claims, Mr. Kennedy fails to provide evidence other than bare allegations and a list of his 43 published technical reports, his 34 training courses, his six patents, his 30-plus years at NASA, his 15 years as a supervisor, and his awards. All of his discussion about his meritorious work history does not show that NASA retaliated against him. See *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1558 n.13 (11th Cir. 1983) (stating that direct evidence "proves existence of fact in issue with inference or presumption'") (quoting Black's Law Dictionary 413 (5th ed. 1979).

Neither does Mr. Kennedy provide probative evidence to show that the defendant's legitimate, nonretaliatory reasons were pretextual. See Young. 840 F.2d at 829 (stating that the plaintiff must present significantly probative evidence). Throughout his brief and affidavits, Mr. Kennedy makes bare allegations that he was a victim of retaliation and that a group of NASA officials were conspiring against him. However, he offers no corroborating

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[13] In his affidavit, the plaintiff states, "I filed my first EEO complaint in 1988 and to date have filed approximately thirty seven complaints." Plaintiff's Affidavit, at 19.

evidence in the form of documents, affidavits, depositions or the like to sustantiate any of his allegations. Fullman, 739 F.2d at 557 (stating that mere allegations of a conspiracy are insufficient). He refers to his 43 published technical reports, his 34 training courses, his six patents, his 30-plus years at NASA, his 15 years as a supervisor, and his awards without explaining the inferential step necessary to prove that such evidence in fact shows pretext.

E. Sex and Race Discrimination

Mr. Kennedy, a white male, makes allegations of sex and race discrimination. A plaintiff can prove sex discrimination or race discrimination either by direct evidence of the three-step process for analyzing circumstantial evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) ; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S Ct. 1089, 67 L. Ed. 2d 207(1981). A plaintiff can also provide substantial statistical proof to establish a prima facie case of discrimination . James v. Stockham Valves & Fittings Co. 559 F.2d 310, 328-29 (11th Cir. 1977), cert. denied, 434 U.S. 1034,98 S. Ct. 767, 54 L.Ed. 2d 781 (1978). Mr. Kennedy provides no direct evidence of sex or race discrimination, and he fails to prove sex or race discrimination through the McDonnell test. He also provides no statistical evidence of sex or race discrimination.

Mr. Kennedy's only references to sex discrimination appear in a few sentences in his affidavits. At one point, he says, "The reason that I inserted the sex discrimination [claim] was that I was

more qualified for the job than the women that got the job with respect to the agency docket number KNCN93-MSFCBO54 [Senior Executive Service Candidate Development Protram]." *Plaintiff's additional affidavit in opposition to defendants' motion for Summary Judgment,*at 4 [hereinafter *Plaintiff's additional Affidavit*]. Out of the eight candidates Mr. Kennedy alleges were selected for the Senior Executive Service Program, five were males. Plaintiff's Affidavit, at 17-18. In all of the other positions for which the plaintiff applied, males were selected.

The only other evidence of sex discrimination that Mr. Kennedy offers is reference to a *Huntsville Times* newspaper article where a NASA Administrator allegedly said that NASA's employees are "too male " and "too pale." [14] Plaintiff's Affidavit, at 23. Such scant references to sex discrimination not only fail to provide direct evidence, they do not show that the defendant's legitimate, nondiscriminatory reasons are pretextual or in reality discriminatory in motive.

The plaintiff's evidence of racial discrimination is also sparse. Along with the alleged statement in the *Huntsville Times,* the plaintiff's evidence of racial discrimination consists of a statement in one of his affidavits that a selecting official who allegedly was seeking to retaliate against the plaintiff for filing numerous discrimination complaints "went outside of Nasa to hire a black applicant [to] head up the Small and Disadvantaged Business Program."

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[14] Mr. Kennedy neither provides a copy of this alleed article nor provides any additional information about it.

Plaintiff's Affidavit, p. 16. Mr. Kennedy not only fails to provide direct evidence of race discrimination, he also fails to show that the defendant's legitimate, nondiscriminatory reasons are pretextual or in reality discriminatory in motive. In short, both Mr. Kennedy's sex discrimination claim and race discrimination claim are without merit.

F. Whistleblower Protection Act

Under the Whistleblower Protection Act, an employer can take no adverse personnel action against an employee on account of "any disclosure of information by an employee" if the employee reasonably believes that the disclosure reveals "a violation of any law, rule or regulation . . . . or a substantial and specific danger to public health or safety." 5 U.S.C. s 2302(b)(8). The plaintiff's affidavits are vague as to exactly which of defendant's actions are related to the plaintiff's whistleblowing claim and at what point in time defendant's actions took place. *See Knollenberg v. Merit Systems Protection Board,* 953 F.2d 623,625 (Fed. Cir. 1992) (stating that the personnel action had to be taken subsequent to the effective date of the Whistleblower Protection Act on July 9, 1989). Assuming without deciding that defendant's actions, whatever they may have been, occured after July 9, 1989, plaintiffs Whistleblower Protection Act Claim cannot proceed because the plaintiff did not exhaust his administrative remedies prior to his bringing the claim to court. In *Knollenbert,* the Federal Circuit Court of appeals held that an individual right of action under the Act "is subject to an express

exhaustion requirement" as found in 5 U.S.C. S 12.14(a)(3), *Knollenberg,* 953 F.2d at 625. The applicable U.S. Code section states :

> Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) from the Special Counsel. . . . .
>
> 5 U.S.C. s 1214(a)(3)

In his affidavit, the plaintiff claims that he suffered "whistlblowing reprisal" for filing discrimination complaints. Plaintiff's Affidavit, at 19. Such a claim falls exclusively within 5 U.S.C. s 2302(b)(9)(a). *Spruill v. Merit Systems Protection Board* 978 F.2d 679, 692 (Fed. Cir. 1992). "The EEOC framework specifically provides for employees who suffer reprisal for the filing of the EEOC complaint." *Spruill*, 978 F.2d at 692 n. 17.

G. Breach of Contract

Mr. Kennedy claims that the defendant breached

an oral agreement that he made with a NASA official. Plaintiff's Affidavit, at 5. Mr. Kennedy stated that he signed an agreement with NASA to withdraw all allegations of discrimination relative to his original ten discrimination complaints with the understanding that he would receive a GM-14 supervisory job within two months. Plaintiff's Affidavit, at 5. This alleged oral promise of an advancement within two months was antecedent to Mr. Kennedy's signing of the agreement, which contained no such clause. The defendant denies such an oral agreement. *Movant's Reply Submission in Response to Exhibit D of the Court's Order,* at 5. Since employment agreements must be in writing, the oral agreement would not be enforceable. See *Poole v. Henderson, Black and* Greene, Inc., 584 So. 2 485, 487 (Ala. 1991) (stating that all oral discussions and agreements made prior to the written contract are merged into the final written agreement). The plaintiff did not allege fraud or misrepresentation in his complaint.

V. Conclusion

The defendant's motion for summary judgment will be granted and the action will be dismissed. Costs will be taxed in favor of the defendant and against the plaintiff.

Done, this 10th of August, 1995.

Edwin L. Nelson
United States District Judge

APPENDIX D - JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, DATED AUGUST 10, 1996

UNITED STATES DISTRICT COURT FOR THE NORTHERN DIVISION OF ALABAMA

Case No : 94-N-0016-M

BOBBY W. KENNEDY

Plaintiff,

v.

DANIEL S. GOLDIN, ADMINISTRATOR FOR THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Defendant.

JUDGMENT

In accordance with the Order Granting Defendants' Motion for Summary Judgment entered this date,

IT IS ORDERED AND ADJUDGED that judgment be, and hereby, is GRANTED in favor of Defendant and against Plaintiff; and

Appendix D

IT IS FURTHER ORDERED AND ADJUDGED that this action is DISMISSED.

IT IS SO ORDERED

s/ Perry D. Mathis
Perry D. Mathis, Clerk

Issued as Mandate : August 31, 1995

COSTS :

Filing Fee $20.00
Printing $330.75

Total $350.75